87-47

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

KEVIN M. COURTRIGHT, *Petitioner,*

v.

STATE OF OHIO, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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Of Counsel

June 15, 1987

QUESTIONS PRESENTED

1. When a policeman questioned an informant to obtain information regarding a homicide, did the policeman's promise that if the informant was not the triggerman, and if he was truthful, he would not be charged render admissions thereafter made by the informant involuntary, and was the subsequent use of such admissions against the informant in a Death-Penalty Aggravated Murder trial a violation of the informant's Fifth Amendment and Fourteenth Amendment right to be free from compulsory self-incrimination?

2. Is an informant who has been appointed counsel on pending charges denied his Sixth Amendment right to counsel when he is questioned in the absence of counsel, as a suspect, on criminal matters factually related to his original charge?

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CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

KEVIN M. COURTRIGHT, *Petitioner,*

v.

STATE OF OHIO, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The petitioner, Kevin M. Courtright, respectfully prays that a writ of certiorari issue to review the mandate of the Ohio Supreme Court dated March 18th, 1987 which denied petitioner's appeal to that court.

OPINIONS BELOW

The Ohio Supreme Court dismissed petitioner's appeal *sua sponte*, and no opinion was written. The opinion of the Tenth Appellate District of Ohio, not yet reported, appears in the Appendix hereto. The Decision and Judgment Entry of the trial court on petitioner's motion to suppress statements, not reported, appears in the Appendix hereto.

JURISDICTION

The mandate of the Ohio Supreme Court was entered on March 18, 1987, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS

This case involves the Fifth and Sixth Amendments. The relevant portions of those amendments to the United States Constitution are set forth in the Appendix, attached hereto.

STATEMENT OF THE CASE

1. How the Federal Question is Presented:

Petitioner moved the trial court to suppress certain statements made by petitioner to police in the absence of counsel. Petitioner asserted a violation of his Fifth Amendment, Sixth Amendment and Fourteenth Amendment rights as a basis for his motion to suppress. The trial court denied the motion to suppress, which denial was upheld by the Tenth Appellate District of Ohio. The Ohio Supreme Court dismissed Petitioner's appeal for lack of a substantial constitutional question.

2. Statement of Facts:

On October 29, 1984 Petitioner Kevin Courtright (hereinafter: Courtright) was arrested for a violation of a federal law prohibiting the sale of cocaine. [Motion Hearing Transcript (hereinafter: MH), Volume I, p. 22]. Courtright appeared in the United States District Court that afternoon, requested that counsel be appointed for him, and attorney Daniel K. Boda (hereinafter: Boda) was appointed by the United States Magistrate to represent Courtright. [MH, Vol. I, p. 28]. Courtright and Boda negotiated a plea bargin with the United States District Attorney wherein Courtright agreed to cooperate with a joint State and Federal investigation of illegal narcotics transactions, in exchange for a reduced charge. [MH, Vol. I, p. 43]. The target of the investigation was David Hite (hereinafter: Hite) and Courtright acted as a police informant in the investigation of the illegal narcotics transactions in which Courtright and Hite participated. [MH, Vol. I, p. 97].

Boda continued to represent Courtright throughout the time that Courtright acted as a police informant. Boda and Courtright agreed that the police could meet with, and question, Courtright in Boda's absence for the limited purpose of facilitating Courtright's participation as an informant. [MH, Vol. II, p. 185]. Between October 31, 1984 and December 24, 1984, several meetings occured between Columbus Narcotics Detectives and Courtright. Boda was not present at those meetings. [MH, Vol. II, p. 184].

On December 28, 1984 Columbus Narcotics Detective Leonard arranged to meet Courtright. [MH, Vol. II, p. 24]. As with the previous meetings between Narcotics Detectives and Courtright, Boda was not informed of this meeting. Unlike the previous meetings, however, and without the knowledge of Courtright or Boda, the purpose of the meeting arranged by Narcotics Detective Leonard was to permit Homicide Detective Medley (hereinafter: Medley) to question Courtright concerning the recent death of Hite. [MH, Vol. I, p. 199-200 and Vol. II, p. 151].

At that meeting, and with the police having full knowledge that Courtright was represented by Boda, Medley questioned Courtright about the homicide of Hite. [MH, Vol. I, p. 202]. During this questioning, Medley also questioned Courtright about the homicide of Deborah Hardy (hereinafter: Hardy). [MH, Vol. I, p. 202] When Courtright exhibited reluctance to discuss the Hardy homicide, Medley told Courtright: "If you was (sic) not the triggerman, and if you are truthful, you have nothing to worry about."[1]

After receiving that assurance, Courtright made a series of incriminating statements between that conversation and January 11, 1985. These statements indicate that Courtright, Hite and two others had participated in events which arose out of Hite's illegal narcotics transactions and culminated in one of the men, Donnie Blunt, shooting and killing Hardy. Courtright's statements were all made outside of Boda's presence, and were ultimately used against Courtright in his trial for the murder of Deborah Hardy. At no time during this process was Boda informed of the police questioning of Courtright regarding the Hardy homicide, even though Medley considered Courtright a homicide suspect from the very moment when Medley promised not to charge Courtright if he was not the triggerman. [MH, Vol. I, p. 211].

[1] There is great debate as to what exactly was promised the informant. This quote is taken from the sworn testimony of Medley at the motion to suppress hearing. [MH, Vol. I, p. 204.]

REASONS FOR GRANTING THE WRIT

This Court should grant petitioner's writ and review this case because Medley's promise that petitioner would not be charged if he was not the triggerman rendered petitioner's statements involuntary, inasmuch as they were induced by a false promise of immunity, and the courts below have failed to consider the constitutional impact of such a false promise. Furthermore, the case presents to this Court an opportunity to reconcile the apparent tension between the holding in *Michigan v. Jackson,* _____ U.S. _____, 106 S. Ct. 1404 (1986), the holding in *Moran v. Burbine,* _____ U.S. _____, 106 S. Ct. 1135 (1986) and the holding in *Maine v. Moutlon,* _____ U.S. _____, 106 S. Ct. 477 (1986). The apparent tension created by reading these cases is the application of Sixth Amendment right to counsel to uncharged crimes which arise out of the factual context of charged crimes for which counsel has already been appointed. Resolution of this conflict is particularly important because of the interplay of the main holdings of *Jackson* and *Moulton,* the factual setting of those cases in juxtaposition to the factual setting of this case, and footnote 16 in the *Moulton* case.

1. Police Promise of Immunity Rendering Statements Involuntary:

This Court announced ninety years ago the principle that a confession obtained by direct or implied promises cannot be a free and voluntary confession. *Bram v. United States,* 168 U.S. 532 (1897). This Court reaffirmed that principle in *Shotwell Manufacturing Co. v. United States,* 371 U.S. 341 (1963).

Despite these precedents, and despite the historical stand of this Court against the use of involuntary confessions[2], the trial court failed to determine the merits of petitioner's involuntary confession claim, and instead focused solely on a *Miranda*

[2] *See: Moran v. Burbine,* _____ U.S. _____, 106 S. Ct. 1135, at 1158, n. 39 (1986) Stevens, J., dissenting.

/custody analysis. Although petitioner's appellate brief did not directly raise this issue, it is apparent that the appellate court also limited its inquiry to only a *Miranda*/custody analysis of the alleged involuntary nature of a confession. Neither the trial court nor the appellate court addressed the question of whether a confession obtained in a non-custodial setting can ever be "involuntary" for Fifth Amendment purposes.[3]

If petitioner's conviction is permitted to stand he will serve fourty-three years in prison before he is eligible for parole consideration, and his claim that his confessions were "involuntary" for Fifth Amendment purposes will have never been resolved by any court. Although this Court does not sit to hear and correct all errors of the law which may have occured below, when that error is of constitutional magnitude and the State Supreme Court has refused to consider the matter as even presenting a constitutional question, the failure of this Court to redress the constitutional error results in an entire state's judicial system repeating the constitutional error in future cases. When the right at issue is the constitutional right to be free from compelled self-incrimination in a very serious criminal charge (Death-Penalty Murder), this Court ought not tolerate that result.

2. Apparent Conflict Between the *Moulton, Burbine* and *Jackson* Cases; Footnote 16.

This Court has recently had occasion to discuss the Sixth Amendment right to counsel in the context of informant cases, [*Maine v. Moulton,* _____ U.S. _____, 106 S. Ct. 477 (1985)], pre-indictment interrogation cases [*Morane v. Burbine,* _____ U.S. _____, 106 S. Ct. 1135 (1986)], and post-arraignment interrogation cases [*Michigan v. Jackson,* _____ U.S. _____,

[3] Petitioner raised the "involuntary" issue at the trial court, as is shown by the motion itself and the arguments of counsel. [The appellate court authorized a complete transcript of the trial court proceedings at state expense, but the oral arguments of both the state and the defendant on the motion to dismiss are, inexpicably, omitted from the record.]

106 S. Ct. 1404 (1986)]. No case presented to this Court has squarely raised the issue of whether or not police may question a defendant, without counsel being present, about uncharged crimes which are part and parcel of the factual context of the crimes for which the defendant has been charged and for which the right to counsel has already been invoked. This case presents the Court with facts one step beyond footnote 16 of *Moulton.*

Footnote 16 stated, in *dicta*, that "incriminating statements pertaining to other crimes, are, of course, admissible at trial of those offenses." *Moulton,* 106 S. Ct. 477 at 490, n. 16. Although *dicta* in the *Moulton* case, the principle of law embodied in footnote 16 was very important to the holding in *Morane v. Burbine,* _____ U.S. _____, 106 S. Ct. 1135, at 1146. The future vitality of the principle stated in footnote 16 in *Moulton* is clear.

Neither of these cases, however, resolve the question of whether a defendant charged with crimes which arise out of certain factual context, having properly invoked his right to counsel as to those charges, may nonetheless be questioned in the absence of counsel as to uncharged crimes which are inextricably intertwined, factually, with the charges for which the right to counsel has been invoked. The facts of this case present that question.

The use of informants by police is evident. The informants are, by their very nature, persons involved in criminal acts. The question presented by this case must be resolved to prevent chaos in the various trial courts which attempt to grapple with the teaching of *Moulton* and *Burbine.* This is a particularly difficult problem when these opinions are read in concert with the opinion in the *Jackson* case.

In *Jackson* this Court stated that knowledge of one police officer of the fact that the defendant has requested an attorney must be imputed to another police officer, that police may not initiate interrogation after a defendant has invoked his right to counsel, and any purported waiver of defendant's Sixth Amendment right to counsel for the police-intiated interroga-

tion is invalid. These rules present an apparent conflict with *Burbine* if the mandate of footnote 16 is not limited to uncharged crimes which do not arise out of the same factual context as the charges for which the defendant has been charged and has invoked the right to counsel.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the courts below.

Respectfully submitted,

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APPENDICES

The Supreme Court of Ohio
Columbus

State of Ohio, Appellee,	:	1987 TERM
	:	To wit: March 18, 1987
v.	:	
	:	Case No. 86-2011
Kevin M. Courtright, Appellant.	:	ENTRY

Upon consideration of the motion for leave to appeal from the Court of Appeals for Franklin County, and the claimed appeal as of right from same said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $20.00, paid by Michael Miller.

THOMAS J. MOYER
Chief Justice

I, Robert L. Edington, Acting Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this date _____.

ROBERT L. EDINGTON ACTING CLERK

_____ DEPUTY

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, Plaintiff-Appellee,	:	
v.	:	No. 86AP-34
Kevin M. Courtright, Defendant-Appellant.	:	(REGULAR CALENDAR)

O P I N I O N
Rendered on September 2, 1986

MR. MICHAEL MILLER, Prosecuting Attorney, and MR. ALAN TRAVIS, for appellee.

MR. STEPHEN E. MAHER, for appellant.

APPEAL from the Franklin County Common Pleas Court.

STRAUSBAUGH, J.

Defendant appeals a judgment of the Court of Common Pleas of Franklin County, sentencing him to not less than thirty years to life for aggravated murder with specification and not less than ten years nor more than twenty years for kidnapping, with an additional three years actual incarceration for use of a firearm, the sentences to run consecutively.

Defendant had been cooperating with federal investigators and Columbus police in their investigation of local narcotics

trafficking. In particular, investigators were interested in defendant's relationship with suspected drug dealer David Hite. Both defendant and defense counsel agreed that counsel need not be present at every meeting between defendant and police, and waived defendant's right to counsel. Defendant and the police investigators met frequently to discuss any information obtained by the parties.

Sometime thereafter, Hite, the target of the investigation, was murdered. Columbus homicide detectives were interested in any possible information which defendant might have regarding the murder and arranged with the narcotics officers to meet defendant.

During this meeting, the homicide detectives mentioned the name of a murdered acquaintance of both Hite and defendant, Deborah Hardy. The detectives testified that, at the mention of Hardy's name, defendant's physical reactions revealed that he knew something about Hardy's death. They also testified to being totally surprised that defendant knew anything about the Hardy murder.

One of the detectives indicated to defendant that he should tell what he knew and that if he did not directly participate in Hardy's murder that nothing would happen to him. Also, the detectives testified that defendant was given his *Miranda* rights on various occasions and that he waived those rights. Defendant maintained that, while he was at the scene, he had nothing to do with Hardy's murder.

By indictment filed on February 14, 1985, defendant was charged with two counts of aggravated murder, R.C. 2903.01, and one count of kidnapping, R.C. 2905.01. Both homicide counts alleged specifications under R.C. 2929.04, thereby permitting imposition of the death penalty.

The case proceeded to trial before a jury. Defendant was found guilty of aggravated murder and kidnapping, with a firearm specification. At the conclusion of the penalty phase, the jury recommended life sentence with no parole eligibility until after thirty years.

Defendant asserts the following four assignments of error:

"I. Appellant's rights to a fair trial by an impartial jury, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and R.C. 2945.25(C), were denied where the trial court utilized a death qualification process which caused the removal of all jurors who told the court that their moral views would make it impossible for them to impose the death penalty under any circumstances.

"II. The court erred to the prejudice of appellant in overruling his motion to suppress statements which were obtained in violation of his Sixth Amendment right to counsel.

"III. Appellant's right to a fair and impartial jury guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §10 of the Ohio Constitution, were denied when over objection the trial court seated a juror whose view on the death penalty would substantially impair the juror's impartial performance.

"IV. The trial court erred to the prejudice of appellant in refusing to instruct the jury on the meaning of culpable mental states which do not rise to the level of purposeful."

In his first assignment of error, defendant contends that utilization of a death qualification process during jury selection denied him a fair cross-section of the community. Defendant presented at trial the testimony of an expert who testified that removal of jurors who stated that they could not vote for the death penalty under any circumstances would cause a conviction-prone jury to be seated. See *Witherspoon v. Illinois* (1968), 391 U.S. 510. We cannot agree with defendant's argument.

The Supreme Court, in *State v. Jenkins* (1984), 15 Ohio St. 3d 164, specifically held, in paragraph two of the syllabus, that:

> "To death-qualify a jury prior to the guilt phase of a bifurcated capital prosecution does not deny a capital defendant a trial by an impartial jury."

Further, the Supreme Court of the United States, in *Lockhart v. McCree* (1986), _____ U.S. _____, 106 S. Ct. 1758, held that the federal constitution does not prohibit removal of prospective jurors whose opposition to the death penalty would prevent or impair the performance of the duties as jurors. Additionally, the death qualification of jurors did not violate either the fair cross-section or impartiality requirements for selection of jurors.

Therefore, the federal constitution is not an impediment to the death-qualification of jurors allowed by Ohio law. The Supreme Court recently approved the holding of *Jenkins, supra*, thereby retaining the death-qualification procedure. *State v. Williams* (1986), 23 Ohio St. 3d 16. The trial properly applied Ohio law.

Defendant's first assignment of error is overruled.

In his second assignment of error, defendant urges that certain statements made to the police should have been suppressed. Defendant argues that he was represented by counsel for his narcotics violation; that his waiver of right to counsel only involved the narcotics investigation; that the Hardy murder investigation was outside the scope of the narcotics investigation; and that his initial incriminating conduct was elicited without any waiver of his right to counsel for other crimes. Defendant's position is that the homicide detectives should have given him his *Miranda* rights before questioning him and that failure to do so requires the suppression of initial incriminating statements as well as any subsequent evidence.

We do not believe that primary focus should be on the extent of defendant's waiver of counsel for the narcotics investigation. Rather, it is the events surrounding the questioning of defendant which are of primary importance.

A review of the suppression hearing testimony indicates that the homicide detectives were surprised that defendant had any information regarding the Hardy homicide; that they originally had no intention of questioning defendant about the Hardy murder; and that defendant was given his *Miranda* rights several times after the initial conversation regarding the Hardy homicide.

A defendant may waive effectuation of the rights conveyed in the *Miranda* warning provided the waiver is made voluntarily, *knowingly and intelligently. Moran v. Burbine* (1986), _____ U.S. _____, 106 S. Ct. 1135, 1141. However, we do not believe a waiver analysis is required herein, inasmuch as defendant was not in custody for purposes of the right to counsel. Further, the police did not violate defendant's right to counsel given the manner in which his participation in the crime arose.

The Sixth Amendment right to counsel.

> "* * * [b]y its very terms, * * * becomes applicable only when the government's role shifts from investigation to accusation. For it is only then that the assistance of one versed in the 'intricacies ... of law,' *ibid.*, is needed to assure that the prosecution's case encounters the 'crucible of meaningful adversarial testing.' * * *.
>
> "* * * [T]his Term, the Court again confirmed that looking to the initiation of adversary judicial proceedings, far from being mere formalism, is fundamental to the proper application of the Sixth Amendment right to counsel. * * * The clear implication * * * is that the Sixth Amendment right to

> counsel does not attach until after the initiation of formal charges. * * *" *Moran, supra*, 106 S. Ct., at 1146.

It is clear that defendant had not been charged with Hardy's homicide, nor had the police even considered initiating charges against him. Moreover, it is clear that the homicide detectives were surprised to learn of defendant's involvement in that homicide.

> "* * * [T]he Sixth Amendment is not violated whenever — by luck or happenstance — the State obtains incriminating statements from the accused after the right to counsel has attached. * * *" *Maine v. Moulton* (1985), _____ U.S. _____, 106 S. Ct. 477, at 487.

See, also, *State v. Stricklen* (1980), 63 Ohio St. 2d 47. Therefore, even if the right to counsel had attached, the circumstances serve as an exception. *Id.*

Defendant's second assignment of error is overruled.

In his third assignment of error, defendant maintains that the trial court erred when it seated one of the jurors; defendant argues that one of the jurors views on the death penalty substantially impaired her performance. Defendant claims the juror showed a predisposition in favor of the death penalty.

Jurors must be able to lay aside their impression or opinion and render a verdict based on evidence presented in court. The burden is on the challenger to show actual existence of partiality. *Irwin v. Dowd* (1961), 366 U.S. 717, 81 S. Ct. 1639.

Here, defendent asserts that the challenged juror was conviction-prone based upon her beliefs regarding the death penalty. As noted above, this assumption is highly speculative. Further, defendant fails to show resulting prejudice, inasmuch as the jury failed to recommend the death penalty. The trial court listened to the juror's views during *voir dire* and conclud-

ed that she would conscientiously apply the law as directed. A review of the *voir dire* testimony reveals that the trial court did not abuse its discretion in seating the juror in question.

Defendant's third assignment of error is overruled.

In his fourth and final assignment of error, defendant urges that the jury instructions should have included alternative definitions of states of mind below that of purposeful, the culpable mental state for aggravated murder; that the jury could better evaluate defendant's state of mind by comparing the terms purposeful, knowingly, recklessly, and negligently. We disagree with this contention.

It is true that this court in *Columbus v. Akins* (Sept. 27, 1984), No. 83AP-977, unreported (1984 Opinions 2494), did allow an additional definition of a state of mind be given the jury to compare with the mental state of recklessness. However, in that case we noted that the trial court failed to adequately explain to the jury all the parameters of the term recklessness and allowed an instruction to clarify the application of recklessness. *Akins* does not require a trial court to automatically instruct on all mental states.

In the instant case, the instructions were adequate to establish the difference between aggravated murder, murder, and involuntary manslaughter. There was no need to give the jury the requested special instructions. See generally, *State v. Dale* (1982), 3 Ohio App. 3d 431; *State v. Verdine* (Feb. 20, 1986), No. 85AP-696, unreported (1986 Opinions 291).

Defendant's fourth assignment of error is overruled.

Defendant's four assignments of error are overruled, and the judgment of the common please court is affirmed.

Judgment affirmed.

MOYER, P.J., and VICTOR J., concur.

VICTOR, J., retired, of the Ninth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

STATE OF OHIO, Plaintiff,	:	
v.	:	Case Number 85CR-01-156
Kevin M. Courtright Defendant,	:	Judge George C. Smith

DECISION
AND
JUDGMENT ENTRY

Rendered this 1st day of October, 1985.

SMITH, J.

This matter came on for hearing on Defendant's Motion to Suppress Statements. The Motion is hereby OVERRULED, and the subject evidence is eligible for admission at the trial of this matter.

After considering the extensive testimony, briefs, and arguments of counsel, the following facts and their legal implications appear to exist.

It is basically uncontroverted that the Defendant was working with Federal and Columbus law enforcement officers on a narcotics investigation. Further, this relationship began following Defendant's arrest for selling two (2) ounces of cocaine to Columbus Police Detective Charles Leonard.

Among the arrangements made with the Defendant was that Daniel K. Boda, Attorney at Law, was appointed to represent the Defendant on the drug charges. The Defendant and his attorney met with law officers relative to Defendant's cooperation in an on-going narcotics investigation.

Following a November 1, 1984, meeting with Federal and Columbus officials, including the Defendant and Attorney

Boda, arrangements were made for the Defendant to meet with Columbus officers and work as an informant. It was agreed that further meetings and contact with the Defendant be carried out without the presence of the Defendant's attorney. Attorney Boda and the Defendant agreed to this arrangement. Also, Attorney Boda placed no limitations on the subject matter the Defendant would be working on, nor was there any limitation that the Defendant's participation be limited to a particular investigation. Generally, the testimony shows that the objective of the investigation in which the Defendant was to participate as an informant was illegal sale of narcotics.

The Defendant signed a "rights waiver" on October 29, 1984, which applied to the then pending drug charge and Defendant's participation in this on-going narcotics investigation. On November 28, 1984, Federal District Court Judge Robert Duncan dismissed the charges against the Defendant arising out of the aforementioned cocaine sale. This was done pursuant to the agreement between the Defendant, his attorney, and the Federal and Columbus officials made at the November 1, 1984, meeting. This charge was to be replaced by a lesser charge of one count of marijuana distribution.

The Defendant was in contact with Detectives Reese and Leonard through December 28, 1984. On December 24, 1984, an alleged drug dealer, David Hite, was killed. The detectives arranged for the Defendant to meet Detective Medley of the Columbus Police Department Homicide Bureau. The Decedent, Hite, was believed to be part of the drug dealing organization about which the Defendant was believed to have information.

The discussion of the Hite killing was in the scope of the narcotics investigation, as was the discussion of the Deborah Hardy killing. The Defendant and both of the above decendents were suspected or known to be involved in illegal drug trafficking.

When Detective Medley asked the Defendant if he knew Deborah Hardy, the Defendant became very upset and indicated to Medley that he was afraid of involving himself. Det. Medley then told the Defendant that if he was not the triggerman and was truthful, he had nothing to worry about. Medley and the Defendant left the restaurant and went outside. Medley then told the Defendant that if he was not the triggerman and had not been part of the conspiracy or not a participant in her killing or murder, he would not be charged.

The Defendant was not advised specifically to talk to his attorney, nor was Attorney Boda or any other attorney contacted before or during these conversations regarding Hite and Hardy. However, the Defendant was given a *Miranda* type warning orally by Medley before the Defendant provided any of the incriminating information or evidence which is the subject of this Motion. This included, but was not limited to, the right to talk to a lawyer; a lawyer will be appointed for you if you cannot afford one, and that he had the right to stop talking at any time.

Detective Reese verifies the giving of the *"Miranda"* type warning to the Defendant by Detective Medley.

It is clear from the evidence that the Defendant, during the December 28, 1984, and the December 31, 1984, taped interviews, was not in custody or under arrest. And based on Defendant's own version of the events, he was only there as an on-looker at the scene of the Deborah Hardy killing. As this was not a custodial situation, there was no need to advise him of his Constitutional rights. *Miranda v. Arizona*, 384 U.S. 436 (1966). However, even if such an advisement was necessary, the evidence indicates that the Defendant was advised of his rights by Detective Medley, and again by Randy Walker prior to the two polygraph test sessions.

Further, the Defendant was neither under indictment, nor had he been charged. Thus, there was no pending criminal case and no Sixth Amendment right to counsel had attached. *Michigan v. Mosley,* 423 U.S. 96 (1975); *United States v. Messler,* 414 F. 2d 1923 (4th Circuit, 1969); *United States v. Lisenby,* 716 F. 2d 1355 (11th Circuit, 1983).

It should be noted that the Defendant was certainly not unaware of his rights. Detective Reese labeled him "streetwise", and the Defendant was involved as a local drug dealer. It would seem that the Defendant was not one who was inexperienced in the criminal investigative process and the rights awarded those who may be accused. The Defendant does not appear to be one who could be taken advantage of easily by law enforcement officers.

The Defendant further confirmed that Det. Medley had advised him that:

> "... when I asked you about the Debbie Hardy homicide that if you was not the triggerman and if you was not involved in any complicity of having her killed that you wouldn't be charged. You remember that." (1/11/85 interview, State's Exhibit 7)

To this the Defendant responded, "Yes", which indicates that the Defendant understood the ground rules.

In sum, the Defendant was by agreement an informant in a narcotics investigation, working with Columbus Police detectives. The discussion of the Hardy homicide and the others that may have been involved in that and drug-related dealings was well within the scope of the agreement.

For whatever reason, the Defendant implicated himself inch by inch from the point of just knowing about the subject killing to participating in the events surrounding it. The police questioning was proper and not coercive. Defendant was forewarned of the police position and advised of his rights. His rights guaranteed by the U.S. Constitution were not violated. The Defendant's statements and other evidence emanating therefrom are admissable at the trial herein.

GEORGE C. SMITH, JUDGE

APPEARANCES:

George M. Ellis, Assistant Prosecuting Attorney
Jeffrey R. Allen, Assistant Prosecuting Attorney
Attorneys for Plaintiff State of Ohio

Daniel K. Boda
Richard A. Cline
Attorneys for Defendant

CONSTITUTIONAL PROVISIONS

1. The fifth amendment of the United States Constitution provides, in relevent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

2. The sixth amendment of the United States Constitution provides, in relevent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing was served, in accordance with Rule 28.3 of the Rules of The Supreme Court of the United States, via ordinary United States Mail, first class postage prepaid, upon S. Michael Miller, Prosecutor for Franklin County, Ohio, at his address of record, on this _____ day _____, 1987.

_____

No. 87-47

IN THE

Supreme Court of the United States

October Term, 1987

KEVIN M. COURTRIGHT,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

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15pp

QUESTIONS PRESENTED FOR REVIEW

I. IS A VOLUNTARY STATEMENT REGARDING A CRIME, MADE TO A LAW ENFORCEMENT OFFICER, RENDERED INVOLUNTARY BY THE OFFICER STATING THAT IF THE INFORMANT WAS NOT A PARTICIPANT IN THE CRIME HE WOULD NOT BE CHARGED IN THAT OFFENSE?

II. MAY STATEMENTS OF AN INDIVIDUAL ABOUT A CRIME TO WHICH NO RIGHT TO COUNSEL HAS ATTACHED BE ADMITTED AGAINST THAT INDIVIDUAL IN THE TRIAL OF THAT CRIME NOTWITHSTANDING THE FACT THAT THE ACCUSED HAD COUNSEL ON UNRELATED CHARGES?

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No. 87-47

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

KEVIN M. COURTRIGHT
Petitioner,

v.

THE STATE OF OHIO
Respondent.

OPINIONS BELOW

The opinions of the Franklin County Court of Common Pleas, the Court of Appeals for the Tenth Appellate District of Ohio and of the Ohio Supreme Court are adequately set forth in the petition.

JURISDICTION

Jurisdiction is claimed by the petitioner under 28 U.S.C. § 1257(3). However, the petition is not timely filed. The decision of the Ohio Supreme Court denying review was entered on March 18, 1987. The petition was not docketed until July 2, 1987.

CONSTITUTIONAL PROVISIONS

The Fifth and Sixth Amendments are adequately set forth in the petition.

STATEMENT OF THE CASE

On February 14, 1985, petitioner was charged by indictment with aggravated murder (by prior calculation and design and in the course of a kidnapping) in the slaying of Deborah Hardy. Prior to trial, petitioner moved to suppress his statements made to police officers while petitioner was acting as an informant in a narcotics investigation. Petitioner's motion generally alleged the statements were obtained in violation of his various rights under the Fifth, Sixth and Fourteenth Amendments. Petitioner's motion did not allege his statements were involuntary. Petitioner did not testify at the hearing held on his motion. The motion was denied and petitioner's statements were admitted at his criminal trial. Petitioner was convicted and sentenced to life imprisonment.

Petitioner appealed his conviction to the Ohio Court of Appeals for the Tenth Appellate District and to the Ohio Supreme Court. On direct appeal to the Ohio courts, petitioner did not claim that his statements were involuntary. Rather, petitioner restricted his argument to a claim that he was denied his Sixth Amendment right to counsel.[1]

Petitioner was originally arrested on October 24, 1984, in Columbus, Ohio, after he sold cocaine to undercover investigators. He was charged with violating federal narcotics laws. Counsel was appointed on the federal narcotics

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[1] Petitioner's claim regarding his statement was restricted to the Sixth Amendment right to counsel and was set forth by the state court of appeals as petitioner's second assignment of error in the appellate court's opinion. Appendix to petition, page A-4. Petitioner did not expand upon that issue in his brief in the Ohio Supreme Court.

charge. Petitioner and his counsel met with representatives of the Federal Bureau of Investigation, Columbus Police Department Narcotics Bureau and the Assistant United States Attorney. It was agreed that if petitioner cooperated fully in the narcotics investigation, he would be charged with one count of distributing marijuana. Petioner and his counsel further agreed that investigators would meet directly with petitioner and that petitioner's counsel need not be present.

After some weeks, authorities concluded petitioner was not cooperating as he had promised. On December 24, 1984, David Hite, petitioner's drug supplier and the subject of the continuing narcotics investigation, was murdered. Columbus homicide investigators asked to meet with petitioner to attempt to learn who might have murdered Hite. On December 28, 1984, investigators met with petitioner at a fast food restaurant. Homicide investigators were interested in Hite's associates and asked petitioner about various people. When Deborah Hardy's name was mentioned, petitioner reacted physically. Petitioner was once again advised of his *Miranda* rights. Petitioner assured investigators that he was not involved in Hardy's murder.[2] Petitioner was told that if he did not participate in Hardy's murder,

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[2] During the motion hearing, investigators testified that they were taken completely by surprise when petitioner stated he knew details of Hardy's murder. The officers told petitioner that if he did not kill Hardy or participate in her death or act with others in causing her death, but was merely a bystander, he would not be charged. Appendix to petition, pages A-11, A-12. The state trial court also found that petitioner acknowledged that this was true in his tape recorded interview with investigators. Appendix to petition, page A-12.

but was merely a bystander, he would not be charged with that crime. After again assuring investigators he was only a bystander, petitioner revealed details of Hardy's abduction and slaying. Investigators did not feel petitioner was a direct participant in the murder. After agreeing to take a polygraph test, petitioner left the restaurant. On January 7, 1985, petitioner appeared at the police station as he had agreed and submitted to the polygraph examination. During the session, after he was again given *Miranda* warnings, petitioner admitted that he had hit Hardy, bound and gagged her, and restrained her while others injected her with drugs. Petitioner was arrested on January 11, 1985, and charged with Hardy's murder.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Petition is Time Barred.

The final judgment of the Supreme Court of Ohio from which petitioner seeks review by writ of certiorari was rendered on March 18, 1987. The petition was not docketed until July 2, 1987. The Court should not relax the provisions of Rule 20.1 in this case. The petition should be considered time barred.

2. The First Question Presented was not Adequately Raised and Preserved in the Lower Courts.

Petitioner did not adequately raise and preserve in the state courts the issue of the voluntariness of his statement to law enforcement officers. Petitioner's motion to suppress and memorandum in support thereof did not assert that his statements were involuntary. In the Court of Appeals and again in the Supreme Court of Ohio, petitioner did not argue that his statements were involuntarily made as a result of promises or for any other reason. Petitioner restricted his argument to the claim that he had a Sixth Amendment right to counsel regarding the slaying of Deborah Hardy and for that reason, his statements should have been suppressed.[3] "[O]rdinarily, this Court does not decide questions not raised or involved in the low-

[3] In the Court of Appeals, petitioner advanced only the Sixth Amendment claim that he was entitled to counsel on the uncharged homicide offense. See assignment of error two set forth in the opinion of the Court of Appeals, appendix to the petition, page A-4. Likewise, petitioner made only the Sixth Amendment claim in seeking review by the Supreme Court of Ohio.

er court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). See *United States v. Mendenhall*, 446 U.S. 544, 551-552, n. 5, (1980). Petitioner's first question presented was not raised, preserved or passed upon by the state courts.

3. Petitioner's Statements were Not Involuntary.

The facts of record do not support petitioner's claim that his statements were involuntary. Petitioner was not promised that he would not be charged with the murder of Deborah Hardy only if he was not the "triggerman", as he now asserts. Rather, petitioner, who had been apprised of his *Miranda* rights on several occasions, was told that he would not be charged with the Hardy murder if he was not the slayer or a participant or a conspirator in the slaying, but was merely a bystander.[4] This statement is not a promise of immunity but merely states the obvious: if petitioner was not involved in the murder, he

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[4] Petitioner states that there is "great debate" as to what investigators said to him. If the record were so unclear on the subject, this case would not be an appropriate one on which to grant the writ of certiorari. However, the state trial judge found that investigators told petitioner that "if he was not the triggerman and had not been a part of the conspiracy or not a participant in her killing or murder, he would not be charged." Trial court decision of October 1, 1985, appendix to petition, page A-11. In his tape recorded statement, petitioner acknowledged this to be the case. Decision of the trial court, appendix to petition, page A-12. These findings of historical fact by a state court, supported by the record, should be deferred to in the absence of convincing evidence to the contrary. See *Marshall v. Lonberger*, 459 U.S. 422 (1983); *Sumner v. Mata*, 449 U.S. 539 (1981).

was not criminally culpable. The converse is equally discernible: if petitioner was involved, he would be charged. This case is not governed by that line of decisions which holds that confessions which are extracted by promises are not voluntary. See *Shotwell Manufacturing Co. v. United States*, 371 U.S. 341 (1963). Petitioner was promised nothing. His statements were not involuntary.

4. Petitioner Had No Sixth Amendment Right to Counsel with Respect to the Murder of Deborah Hardy.

Petitioner's statements regarding his involvement in the murder of Deborah Hardy were made before any formal adversarial judicial proceedings were commenced in regard to that crime. Petitioner was not under arrest for the murder of Deborah Hardy, and no charges were preferred against him for that offense until after he acknowledged his participation in the murder. At the time of his statements, petitioner had no Sixth Amendment right to counsel with respect to the murder of Deborah Hardy.

> "By its very terms (the right to counsel) becomes applicable only when the government's role shifts from investigation to accusation.
> * * * *"[T]he Sixth Amendment right to counsel does not attach until after the initiation of formal charges."
> *Moran v. Burbine*, 475 U.S. 412, 106 S. Ct. 1135, 1146 (1986).

It is without dispute that where there is no right to counsel and an accused is not in custody, there is no basis to suppress his voluntary statements. "Incriminating statements pertaining to other crimes, as to which the Sixth Amendment has not yet attached, are, of course, admissible

at trial of those offenses." *Maine v. Moulton*, 474 U.S. 159, 106 S. Ct. 477, at 490 n. 16 (1985).[5] The fact that an attorney-client relationship exists does not create a Sixth Amendment right to counsel. The Sixth Amendment does not protect an attorney-client relationship before prosecution has been commenced by way of formal charge. *Moran, supra*, 475 U.S. 412, 106 S. Ct. 1135 at 1145-1146.[6]

Petitioner, who was not under arrest and not charged with the murder of Deborah Hardy, had no Sixth Amendment right to counsel with regard to that offense. His statements were properly admitted into evidence against him. *Maine v. Moulton, supra.*[7]

[5] Petitioner asserts that footnote 16 in *Moulton* is but *dicta;* that the court should address the issue of informant crimes related to other crimes to which the right to counsel has attached. *Moulton* involved a series of thefts of automobiles and automotive parts. Moulton was under indictment for some of those crimes while others were the subject of his incriminating statements to his co-defendant, an informant for the authorities. Moulton's series of crimes were at least as intertwined as petitioner's sale of cocaine and the murder of Deborah Hardy.

[6] In *Moran*, the accused was in custody in connection with a burglary charge. While being questioned, he implicated himself in a homicide. Counsel was retained to represent Burbine on the burglary charge. Despite the fact, this Court found Burbine had no right to counsel on the uncharged homicide.

[7] Contrary to petitioner's belief, *Michigan v. Jackson*, 475 U.S. , 106 S. Ct. 1404 (1986) is not in conflict with *Maine v. Moulton, supra*, or *Moran v. Burbine, supra.* Jackson involved questioning of an accused about the offense for which he had been arraigned and after he had requested counsel. *Jackson* is not in conflict with *Moran* or *Moulton.*

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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COUNSEL OF RECORD

CERTIFICATE OF SERVICE

Pursuant to Rule 28 of the Rules of Practice of this Court, I, Alan C. Travis, a member of the Bar of this Court, hereby certify that on the day of July, 1987, three copies of Respondent's Brief in Opposition to the Petition for Writ of Certiorari in the above entitled case were served upon the petitioner by United States Mail, first class, postage prepaid, addressed to Richard A. Cline, Durkin, Cline and Co., L.P.A., 580 South High Street, Suite 316, Columbus, Ohio 43215, counsel of record for petitioner. I further certify that all parties required to be served have been served.

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